No. 92-805

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In The

Supreme Court of the United States

October Term, 1992

TIMOTHY A. DeWITT, et al.,

Appellants,

v.

THOMAS S. FOLEY, et al.,

Appellees.

On Appeal From The United States
District Court For The
Northern District Of California

MOTION OF APPELLEES GOVERNOR OF CALIFORNIA PETE WILSON AND SECRETARY OF STATE MARCH FONG EU TO AFFIRM

DANIEL E. LUNGREN
Attorney General
of the State of California
FLOYD D. SHIMOMURA
Assistant Attorney General
LINDA A. CABATIC, Supervising
Deputy Attorney General
*ALLEN SUMNER
Assistant Attorney General
1515 K Street
Sacramento, CA 95814
(916) 324-5463

Attorneys for Appellees Pete Wilson and March Fong Eu

*Counsel of Record

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QUESTION PRESENTED

Is the requirement of 2 U.S.C § 2c that Representatives be elected in single-member districts a valid exercise of Congress' authority to prescribe the "times, places and manner of holding elections" for its members under Art. I, § 4, of the Constitution?

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TIMOTHY A. DeWITT, et al.,

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On Appeal From The United States District Court For The Northern District Of California

MOTION OF APPELLEES GOVERNOR OF CALIFORNIA PETE WILSON AND SECRETARY OF STATE MARCH FONG EU TO AFFIRM

Appellees Pete Wilson, Governor of the State of California, and Secretary of State March Fong Eu hereby move this Court, pursuant to Rules of the Supreme Court, Rule 18.6, to affirm the judgment of the United States District Court for the Northern District of California on the grounds that the question presented by this appeal is without merit and needs no further briefing or argument.

STATEMENT OF THE CASE

A. Summary of Material Facts

As stated in the opinion below:

> "Plaintiffs are three residents of California's seventh congressional district, and one resident of the state of Virginia. In the 1990 primary and general elections, the California plaintiffs attempted to vote for candidates outside the seventh district by writing different district numbers on their ballots and writing in the names of candidates in those districts. They allege that they want to associate with like-minded voters across the state to elect congressional representatives. The Virginia plaintiff wants to associate with like-minded Latino voters across *state* lines by voting in California's congressional elections." Slip opinion, Appen. A, *infra*, pp. 2-3; emphasis in original.

The Congressional redistricting plan which appellants challenge was ordered by the California Supreme Court in January of 1992. *Wilson v. Eu*, 1 Cal.4th 707 (1992). The Court accepted and adopted, as modified, a redistricting plan proposed by three special masters appointed by the Court four months earlier in light of the failure of the Legislature of California to adopt a plan for the 1992 primary and general elections. *Wilson v. Eu*, 54 Cal.3d 471 (1991).[1] The redistricting plan allocates

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[1] The masters held six days of public hearings in Los Angeles, Sacramento, San Diego and San Francisco. *Wilson v. Eu, supra*, 1 Cal.4th at 713. Oral and written testimony was received on a number of topics relating to redistricting, as well as 22 separate redistricting plans proffered by various inter-

California's Congressional Representatives into 52 single-member districts.

B. Summary of Procedural History

On January 29, 1992, appellants filed a complaint challenging the redistricting plan for California's congressional delegation. Specifically, appellants alleged that 2 U.S.C § 2c[2], which requires election of Representatives

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ested parties. *Id.*, at p. 742. The masters additionally reviewed transcripts from 12 public hearings on redistricting held by the California Senate between December 1990 and September 1991. *Ibid.* Appellants failed to participate in any of these hearings.

Upon presentation of the masters' report, the California Supreme Court itself then accepted additional written comments and amici curiae briefs from interested parties before adopting the masters' plan, as modified. *Id.*, at p. 720. Again, no comment was received from appellants.

Following adoption of the California Supreme Court's plan, a three-judge panel of the District Court dismissed a challenge to the plan unrelated to appellants' action on the grounds of abstention, stating: "We have no doubt that the state proceedings here provided the required due process for the adjudication of the federal issues." *Members of Democratic Cong. Delegation v. Eu*, 790 F. Supp. 925, 932 (N.D. Cal. 1992).

[2] Section 2c, enacted in 1967, provides in relevant part:

> "In each State entitled . . . to more than one Representative . . . there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative. . . . "

by single-member districts, and the implementing provisions of the California Constitution, Art. XXI, § 1(a)[3], and Elections Code § 25000[4], are unconstitutional. The complaint alleged seventeen separate claims for relief, contending, inter alia, that election by single-member districts violates Art. I, § 2, cl. 1, 2, and 3, Art. IV, § 4, and the First, Fourteenth, Fifteenth, Nineteenth, and Twenty-Sixth Amendments to the Constitution, as well as the federal Voting Rights Act, 42 U.S.C. § 1971 et seq. The court below summarized:

> "The gravamen of these claims is that minority groups (whether by race, sex, age or political orientation) are unable to obtain representation in proportion to their numbers; because while they may have enough votes state-wide to elect a representative, they rarely constitute a majority within a congressional district. This allegedly perpetuates a House of Representatives composed of predominantly white male incumbents, in an increasingly heterogeneous society." Appen. A at p. 4.

On March 16, 1992, state defendants Governor Wilson and Secretary of State Eu moved to dismiss the complaint pursuant to Federal Rules of Civil Procedure,

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[3] Article XXI, § 1(a) provides in relevant part: "Each member of . . . Congress . . . shal' be elected from a single-member district."

[4] Section 25000 states in relevant part: "At each general election there shall be elected to the Congress of the United States: (a) One Representative for each congressional district. . . . "

Rule 12(b), for, inter alia, failure to state a claim upon which relief may be granted.[5]

The motion was argued on May 5, 1992, before a three-judge panel of the District Court for the Northern District of California pursuant to 28 U.S.C § 2284(a). On August 31, 1992, the court granted defendants' motion, dismissing the action without leave to amend. Appen. A.

Notice of Appeal was filed on September 11, 1992.

On September 15, 1992, appellants applied to Justice O'Connor, as Circuit Justice for the Ninth Circuit, to stay the opinion below and enjoin defendants from either administering the November 3 general election or giving effect to the June 2 primary election of California's Congressional delegation. The application for stay and injunctive relief was denied by Justice O'Connor on September 22.

On October 2, 1992, appellants "renewed" their application for stay and injunctive relief, this time directing the application to Justice Scalia. The application was denied by Justice Scalia on October 13.

Appellants' Jurisdictional Statement was then received on November 5, 1992, prompting this Motion To Affirm.

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[5] Defendants also moved to dismiss on the basis of plaintiffs' laches in waiting to file their challenge until the eve of California's primary election. The court held that in view of its judgment dismissing the action for failure to state a claim upon which relief may be granted, it need not address the question of laches. Appen. A at p. 19.

STATEMENT

This case involves the sole issue of whether Congress has the authority under Art. I, § 4, of the Constitution to prescribe the "times, places and manner of holding elections" for its members include the power to require that election be by single-member district as provided in 2 U.S.C § 2c.[6]

Clearly, it does. As detailed below, Congress required election by single-member districts over 150 years ago; this Court has recognized the validity of single-member districts since *1879*. In dismissing appellants' complaint, the district court aptly summarized, "Congress' authority to require that elections be held by single-member districts can no longer be seriously questioned." Appen. A at p. 17. This appeal presents no issue requiring further briefing, argument or consideration by this Court.

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[6] Appellants also challenge the authority of the California Supreme Court to order redistricting in the face of failure by the California Legislature to enact a plan in time for the state's primary and general elections. The same argument was raised below and dismissed by the court in one sentence: " . . . there is a long history of court participation in redistricting when the elected branches do not do so. See authorities cited in *Members of California Congressional Delegation v. Eu*, 790 F. Supp. 925 (N.D. Cal. 1992)." Appen. A at p. 19.

Almost 30 years ago this Court declared: "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by the Court but appropriate action by the State in such cases has been specifically encouraged. [citations.]" *Scott v. Germano*, 381 U.S. 407, 409 (Per Curiam) (1964). This issue requires no further attention from the Court.

Accordingly, the judgment of the District Court should be affirmed.

ARGUMENT

I

DEFENDANTS ARE BOUND BY CONGRESS' DETERMINATION THAT ELECTIONS BE HELD IN SINGLE-MEMBER DISTRICTS

The role of state appellees Governor Wilson and Secretary of State Eu in this action is merely "formalistic," arising solely from their responsibility to conduct California's Congressional elections using the single-member districts adopted by the California Supreme Court. *Members of California Democratic Cong. Delegation v. Eu, supra,* 790 F. Supp at 728.

In fashioning the instant redistricting plan, the California Supreme Court was "guided by" its previous redistricting decisions. *Wilson v. Eu, supra,* 1 Cal.4th at 713. Those decisions in turn cite Congress' mandate of single-member districts as binding upon the State of California. *Legislature v. Reinecke,* 6 Cal.3d 595, 603 (1972).[7]

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[7] In creating the Congressional districts here at issue the California Supreme Court's masters were primarily guided by this Court's directions in *Karcher v. Daggett,* 462 U.S. 725 (1983). *Wilson v. Eu, supra,* 1 Cal.4th at 717. *Karcher* directs:

> "Article I, § 2, establishes a 'high standard of justice and common sense' for the apportionment of congressional ***districts***: 'equal representation for equal numbers of people.' *Wesberry v. Sanders,* 376

Congress' mandate of election by single-member districts is the supreme law of the land and binding upon the state defendants. Art. VI, § 2.

II

CONGRESS HAS AUTHORITY TO REQUIRE ELECTION BY SINGLE-MEMBER DISTRICTS

Appellants acknowledge at the outset that there is no case expressly upholding Congress' authority to prescribe election by single-member districts. Thus plaintiffs, defendants and the court below have each had to make an exhaustive search of the history of Art. I, § 4, cl. 1.[8]: the drafters' debates over its wording, the arguments for and against ratification, the statutes Congress has enacted pursuant to this authority over the past 150 years, and this Court's analysis of those enactments. The full historical record is detailed in the District Court's opinion and defendants original motion to dismiss. Appen. A and B, respectively. For purposes of this motion to affirm, appellants offer a more condensed version.

U.S. 1, 18 (1964). Precise mathematical equality, however, may be impossible to achieve in an imperfect world; therefore the 'equal representation' standard is enforced only to the extent of requiring that ***districts*** be apportioned to achieve equality 'as nearly as is practicable.'" *Id.*, at 730; emphasis added.

[8] "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

A. The Founders Intended That Congress Have Authority To Ensure Its Members Are Elected By District

Alexander Hamilton termed Art. I, § 4, the most "completely defensible" provision of the entire Constitution: "Its propriety rests upon the evidence of this plain proposition, that ***every government ought to contain in itself the means of its own preservation.***" *The Federalist, No. 59* (Mentor 1961) at p. 363; emphasis in original.

From inception through ratification, those who drafted, debated, supported or opposed the Constitution all recognized that Congress would have authority to require that Representatives be elected by single-member districts.

The drafters' initial debate was whether Representatives should be elected directly by the people in ***districts***, or indirectly by state legislatures.[9] Once it was concluded that election should be directly by the people, the debate turned to whether Congress or the states should control the holding of these elections. Madison supported shared authority between Congress and the states over the "time, places and manner" of elections – including the authority to require election by district.[10]

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[9] George Mason and James Wilson of Virginia proposed direct " . . . election by the people in large ***districts*** which would be most likely to obtain men of intelligence and uprightness; subdividing the ***districts*** only for the accommodation of voters." Madison, *Notes of Debates in the Federal Convention of 1787* (Norton 1987) at p. 85; emphasis added.

[10] "These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary

The Constitution presented for ratification contained Art. I, § 4, in its present form, giving Congress the "wide latitude" over election of its members which Madison had argued for. This power – particularly the possibility that Congress would require election at-large as requested by appellants – was one of very the arguments raised in opposition to ratification.[11] Those supporting ratification countered that Congress must have this authority to correct unequal districts created by the states. 2 J. Elliott's *Debates on the Federal Constitution* 27 (1876); *Oregon v. Mitchell*, 400 U.S. 112, 120, n. 2 (1970).

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power. Whether the electors should vote by ballot or via voce; should assemble at this place or that place; should be divided into ***districts*** or meet all at one place; should all vote for all the representatives; ***or all in a district vote for a number allotted to the district***; these and many other points would depend on the Legislatures, and might materially affect the appointments. . . . What danger could there be in giving a controlling power to the National Legislature? Of whom was it to consist?" *Id.* at 423; emphasis added.

[11] "The proposed Congress may make the whole state one district, and direct that the capital (the City of New York, for instance) shall be the place for holding the election. . . . They may declare that those members who have the greatest number of votes, shall be considered as duly elected; the consequence would be that the people, who are dispersed in the interior parts of the state, would give their votes for a variety of candidates, while any order, or profession, residing in the populous places, by uniting their interests, might procure whom they pleased to be chosen – and by this means the representatives of the states may be elected by one-tenth part of the people who actually vote." "Brutus" Essay IV, to the People of the State of New York, November 29, 1787, *The Anti-Federalist Papers* (Ketcham ed. 1986) at p. 329; See also "Speech of Patrick Henry to the Virginia Ratifying Convention," June 7, 1788. *Id.* at p. 215.

Thus in both the drafting and ratification debates, each side recognized Congress' ultimate authority to decide if elections would be by districts. The question was only whether placing this power in Congress was the best way to in fact assure election by local districts – a goal shared by both sides.

B. Congress Has Exercised Its Power To Require District Election For 150 Years Without Challenge

Congress took no action regarding district elections for the first 50 years following ratification, resulting in great diversity among the states in the manner of choosing Representatives. *Colegrove v. Green*, 328 U.S. 549, 555 (1945). Some states did in fact elect all their Representatives on a single state ticket. *United States v. Gadwell*, 243 U.S. 476, 482 (1916).

In 1842 Congress enacted its first law requiring election of Representatives in single-member districts. Act of June 25, 1844, § 2, 5 Stat. 491; *Whitcomb v. Chavis*, 403 U.S. 124, 158, n 39 (1970). Congress acted to eliminate at-large elections because it concluded that the "general ticket system" worked an injustice both to other states which did not use it and to minority voters in those states which did. *Ex Parte Yarbrough*, 110 U.S. 651, 660 (1883). Congress' action in 1842 "signalled is belief that Representatives should be representative." *Montano v. Lefkowitz*, 575 F.2d 378, 385 (2nd Cir. 1978).

There is no history of any challenge to Congress' decision in 1842. However, 37 years later this Court

would cite Congress' action in a series of cases during the 1870's and 1880's dealing with various election reforms enacted to protect newly-freed black voters and implement the Fourteenth and Fifteenth Amendments. "Crimes Against the Elective Franchise and Civil Rights of Citizens," Rev. Stats. of 1873-74, §§ 5506 to 5532.

This Court sustained enactment of these statutes as within Congress' authority to prescribe the "times, places and manner" of elections pursuant to Art. I, § 4. Citing as precedent Congress' action 37 years earlier requiring single-member districts, this Court explained:

> "Congress has partially regulated the subject heretofore. In 1842, it passed a law for the election of representatives by separate districts; and, subsequently, other laws fixing the time of election, and directing that the elections shall be by ballot. ***No one will pretend, at least at the present day, that these laws were unconstitutional because they only partially covered the subject.***" *Ex Parte Siebold*, 100 U.S. 371, 384 (1879); emphasis added.

This Court characterized Congress' authority under Art. I, § 4, as "plenary," *Id.* at 388, explaining: "The power of Congress, as we have seen, is paramount, and may be exercised at any time, and to any extent which it deems expedient. . . . " *Id.* at 392. See also *Ex Parte Yarbrough, supra*, 110 U.S. 651, following and citing *Ex Parte Siebold* in upholding other convictions under the Civil War election reforms.

The requirement of single-member districts continued, with minor interruption, from 1842 until 1929. *Colegrove v. Green, supra*, 328 U.S. at 555. In 1929, however,

Congress omitted the requirement in implementing the Fifteenth Census. 46 Stat. 21, c. 28. Although Congress did not expressly repeal the previous express requirement of single-member districts, this was the result of its action. *Wood v. Brown*, 287 U.S. 1, 6 (1932).

Elimination of single-member districts of equal population led again to disparity and malapportionment between districts, this time forcing the Court itself to intervene. *Wesberry v. Sanders*, 376 U.S. 1 (1963).

Although Congress' authority pursuant to Art. I, § 4, was not directly in issue in *Wesberry*, it was cited by both the majority and dissent. The majority pointed to the Founders' debates as clear intent that Congress was to have the power to ensure equal representation, including by districts. *Id.*, at 16. Justice Harlan's dissent argued that Congress' authority under Art. I, § 4, was the very reason why the Court should not act. *Id.*, at 30. Following the Founders' debates of a century before, both sides accepted as given Congress' authority to act. Now the question was the Court's responsibility should Congress fail to do so.

Four years after *Wesberry*, Congress enacted the present 2 U.S.C. § 2c, again expressly requiring election by single-member districts. Courts have characterized the debates over this provision in 1967 as "echoing the views of their predecessors of 1842 with respect to the representative nature of representatives," *Montano v. Lefkowitz*, *supra*, 575 F. 2d at 385, and having "made clear their distaste for at-large elections." *Shayer v. Kirkpatrick*, 541 F. Supp. 922, 927 (W.D. Mo. 1982).

As with Congress' initial decision in 1842 requiring single-member districts, there was no direct challenge to re-enactment of the requirement in 1967. However, just as this Court cited the 1842 statute as precedent for the election reforms of the 1870's, *Ex Parte Siebold, supra,* 110 U.S. 651, so too did this Court cite the 1967 re-enactment as precedential authority for the Voting Rights Act Amendment of 1970, which lowered the voting age to 18. *Oregon v. Mitchell, supra,* 400 U.S. 112 (1970). In his lead plurality opinion upholding Congress' power, Justice Black explained:

> "The breadth of power granted to Congress to make or alter election regulations in national elections . . . is demonstrated by the fact that the Framers of the Constitution and the state legislatures which ratified it ***intended to grant to Congress the power to lay out or alter the boundaries of congressional districts.*** . . . And in *Colegrove v. Green,* 328 U.S. 549 (1946), no Justice of this Court doubted Congress' power to rearrange the congressional districts according to population; the fight in that case revolved about the judicial power to compel redistricting.
>
> ***"Surely no voter qualification was more important to the Framers than the geographical qualification embodied in the concept of congressional districts. The Framers expected Congress to use this power to eradicate 'rotten boroughs,' and Congress has in fact used its power to prevent States from electing all Congressmen at large.*** There can be no doubt that the power to alter congressional district lines is vastly more significant in its effect than the power to permit 18-year-old citizens to go to the

polls and vote in all federal elections." *Id.* at 121-122; emphasis partially added.

Oregon was this Court's last occasion to address Art. I, § 4, and it was consistent with all of the Court's previous comments. For 150 years Congress has exercised its power pursuant to Art. I, § 4, to require election by single-member districts. For 100 years this Court has recognized Congress' power, citing it as authority for other election laws premised upon Art. I, § 4.

CONCLUSION

Interesting as this historical review is, and much as appellants would enjoy rearguing the debates of James Madison and Patrick Henry, nothing in this case warrants further attention by the Court. Analysis of over 200 years' worth of drafters' intent, Congressional implementation and judicial review merely returns us to Hamilton's basic premise:

> "A newly created national government could hardly have been expected to survive without the ultimate power to rule itself and to fill its offices under its own laws." *Oregon v. Mitchell, supra,* 400 U.S. at 123.

Article I, § 4, gives Congress plenary authority over the procedures to be followed in electing its members, including the power to require that elections be by single-member districts. The court below correctly concluded that "Congress' authority to require that elections be held by single-member districts can no longer be seriously questioned." Appen. A at p. 17.

For the foregoing reasons, appellees respectfully submit that this challenge to 150 years of precedent is so unsubstantial as to need no further argument. The judgment of the District Court for the Northern District of California should be affirmed.

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General of the State of California

FLOYD D. SHIMOMURA
Assistant Attorney General

LINDA A. CABATIC Supervising Deputy Attorney General

ALLEN SUMNER
Assistant Attorney General

Attorneys for Appellees California Governor Pete Wilson and Secretary of State March Fong Eu

DATED: December 3, 1992

APPENDIX A

UNITED STATES DISTRICT COURT*
NORTHERN DISTRICT OF CALIFORNIA

TIMOTHY A. DeWITT, PAMELA R. DeWITT-CARTER, DOROTHY S. BALDWIN, RENE A. RIVAS, Plaintiffs, v. THOMAS S. FOLEY, Speaker of the U.S. House of Representatives; PETE WILSON, Governor of the State of California; MARCH FONG EU, Secretary of State of the State of California, Defendants.	No. C-92-0510-CAL (Three Judge Court) OPINION AND JUDGMENT OF DISMISSAL (Filed AUG 31 1992)

Before NOONAN, Circuit Judge, LYNCH and LEGGE, District Judges.

LEGGE, District Judge:

I.

Defendants have moved to dismiss this action pursuant to Federal Rules of Civil Procedure 12(b)3 and 12(b)6. The motion was opposed, heard and submitted for decision. The court has considered the moving and opposing papers, the record, the arguments, and the applicable authorities.

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*Any typographical and/or incorrect punctuation found in the following Appendix pages were left intentionally to show accurately how the original documents appeared.

The court concludes that plaintiffs' challenges to district elections are not supported by the United States Constitution, federal statutes, the California Constitution, California statutes, or case law. The court therefore concludes that the action should be dismissed.

II.

Title 28 U.S.C. § 2284(a) provides for a three-judge court "when an action is filed challenging the constitutionality of the apportionment of congressional districts." Defendants argue that plaintiffs are not entitled to this three-judge court because they are challenging the constitutionality of pre-established districts, rather than the allocation of representatives among those districts. Defendants cite *Members of California Congressional Delegation v. Eu*, 790 F.Supp. 925, 926 n.1 (N.D. Cal. 1992), for the proposition that "'reapportionment' describes the process of allocating representatives among pre-established districts."

The statute refers to "apportionment," not "reapportionment." Plaintiffs here challenge the fact of apportionment among districts, rather than the manner in which those districts have been drawn. This is sufficient to bring them within the ambit of the statute.

III.

Plaintiffs are three residents of California's seventh congressional district, and on resident of the state of Virginia. In the 1990 primary and general elections, the

California plaintiffs attempted to vote for candidates outside the seventh district by writing different district numbers on their ballots and writing in the names of candidates in those other districts. They allege that they want to associate with like-minded voters across the state to elect congressional representatives. The Virginia plaintiff wants to associate with like-minded Latino voters across *state* lines by voting in California's congressional elections.

The complaint attempts to allege seventeen claims for relief. The first through ninth and eleventh through fifteenth are that § 100 of the California Elections Code violates a number of provisions of the U.S. Constitution[1] and the federal Voting Rights Act, 42 U.S.C. § 1971 *et seq.* The tenth claim is that the creation of special minority districts, which was done in California under the Voting Rights Act, violates the Fourteenth, Nineteenth, and Twenty-Sixth Amendments. The sixteenth claim is that 2 U.S.C. § 2(c), Article XXI, § 1 of the California Constitution, and § 2500 of the California Elections Code, which require the establishment of single-member congressional districts, violate the same provisions of the U.S. Constitution and the Voting Rights Act. Finally, the seventeenth claim is that the recent redistricting by the California Supreme Court, which was considered by this court in *Congressional Delegation v. Eu, supra,* violated Article I, § 4 of the U.S. Constitution, because such redistricting must

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[1] Art. I, § 2, cl. 1, 2, and 3; Art. IV, § 4; and the First, Fourteenth, Fifteenth, Nineteenth, and Twenty-Sixth Amendments.

be done by Congress or state legislature, and not by the courts.

The gravamen of these claims is that minority groups (whether by race, sex, age or political orientation) are unable to obtain representation in proportion to their numbers; because while they may have enough votes state-wide to elect a representative, they rarely constitute a majority within a congressional district. This allegedly perpetuates a House of Representatives composed of predominantly white male incumbents, in an increasingly heterogeneous society.

IV.

Plaintiffs' complaint concerns both federal and California law.

The U.S. Constitution contains the qualifications for voters and candidates for Congress. Article I, § 2, clause 1 of the United States Constitution sets forth the requirements for persons entitled to vote for representatives as follows (the "Voter Qualifications" clause):

> [T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Clause 2 of that same section sets forth the qualifications for representatives themselves (the "Candidate Qualifications" clause):

> No Person shall be a Representative who shall not have attained to the Age of twenty five years, and been seven Years a Citizen of the United States, and who shall not, when elected,

> be an Inhabitant of that State in which he shall be chosen.

The Constitution also empowers both Congress and the state legislatures to make rules governing the time, place and manner of holding these elections. Section 2 of the Fourteenth Amendment amended the third clause of Article I, § 2 (the "Apportionment" clause) to provide that

> Representatives shall be apportioned among the several States according to their respective numbers. . . .

Article I, § 4 provides that

> The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations. . . .

Congress' authority here is paramount. Congress has enacted legislation requiring the states to establish single-member districts, 2 U.S.C. § 2(c). That statute requires each state entitled to more than one representative to:

> establish[] by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative. . . .

California's Constitution also requires that the legislature establish, and that representatives by chosen from, single-member districts. Article XXI, § 1, is entitled "Reapportionment," and provides that after each decennial national census, "the Legislature shall adjust the

boundary lines of the . . . Congressional . . . districts." The districts shall be "reasonably equal" in population, and "[e]ach member of the . . . Congress shall be elected from a single-member district." *Id.* at § 1(b), 1 (a).

The California Elections Code also provides for single-member districts, and allows voters to vote only in the "territory" in which they reside. California elections Code § 25000(a) states that "[o]ne Representative [shall be elected to the Congress of the United States] for each congressional district." Section 100(a) provides that otherwise qualified persons "may vote at any election held within the territory within which he or she resides and the election is held." Neither § 100 nor its relatives purport to define "territory." Plaintiffs argue that this section imposes a voter residency requirement not found in any other constitutional or statutory provision.

V.

Defendants Governor Wilson and Secretary of State Eu move to dismiss the complaints, primarily on the ground that Article I, § 4 of the U.S. Constitution, which gives Congress the authority to prescribe the "times, places and manner" of holding elections for representatives, gives it the power to require that representatives be elected by district. Congress exercised that power in enacting 2 U.S.C. § 2(c), which is binding on the states. *Assembly v. Deukmejian*, 30 Cal.3d 638, 662; 180 Cal.Rptr. 297, 311 (1982) (2 U.S.C. § 2(c) "forbids the use of statewide elections to fill congressional seats").

A.

There are no cases squarely defining Congress' power under Article I, § 4 to require that representatives be elected by district. However this court concludes that this power is supported by case law and by documents which are part of the "legislative history" of that article.

As will be discussed below, Congress first exercised that constitutional power in 1842, requiring election by single member districts. In 1879 the U.S. Supreme Court assumed, without discussion, that this exercise of power was constitutional. Congress effectively repealed the requirement that representatives be elected from single member districts in 1929, and reenacted it in 1967. In 1970, a Justice of the Supreme Court concluded that "the Framers of the Constitution and the state legislatures which ratified it intended to grant to Congress the power to lay out or alter the boundaries of Congressional districts." *Oregon v. Mitchell*, 400 U.S. 112, 121 (1970) (opinion of Black, J.).

B.

At the Constitutional Convention of 1787, the Committee of Detail proposed draft language similar to the final version of Article I, § 4:

> The times and places and manner of holding the elections of the members of each House shall be prescribed by the Legislature of each State; but their provisions concerning them may, at any time be altered by the Legislature of the United States.

Madison, *Notes of Debates in the Federal Convention of 1787* (Ohio Univ. Press 1966) at 387.

Two delegates opposed giving Congress any power over such matters, contending that the states could and must be relied upon. Madison addressed the Convention:

> [T]he legislatures of the States ought not to have the uncontrolled right of regulating the times places and manner of holding elections. These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power. **Whether the electors should . . . be divided into districts or all meet at one place, should all vote for all the representatives; or all in a district vote for a number allotted to the district. . . .**

Id. at 423-24 (emphasis added).

Three other delegates agreed that Congress should have the ultimate authority over the time, place, and manner of choosing representatives, and the debate was at an end. The draft was adopted unanimously. *Id.* at 424-25. That is clear evidence that the power to prescribe the "places and manner" of elections, reposed in the first instance in the several States and ultimately in the Congress, includes the power to prescribe that they be held by district. *See Wesberry v. Sanders*, 376 U.S. 1, 33-34 (1964) (Harlan, J., dissenting) ("These remarks of Madison . . . [s]upported by others at the Convention, and not contradicted in any respect . . . indicate as clearly as may be that the Convention understood the state legislatures to have . . . the power to district well or badly, subject only to the supervisory power of Congress. . . . The

debates in the ratifying conventions, as clearly as Madison's statement . . . indicate that under § 4, the State legislatures, subject only to the ultimate control of Congress, could district as they chose").

This conclusion is bolstered by the U.S. Supreme Court's observation that:

> Madison in *The Federalist* described the system of division of States into congressional districts, the method which he and others assumed states probably would adopt: "The city of Philadelphia is supposed to contain between fifty and sixty thousand souls. It will therefore form nearly two districts for the choice of Federal Representatives."

Wesberry v. Sanders, 376 U.S. 1, 15 (1964) (quoting The Federalist, No. 57 (Cooke ed. 1961), at 389). *See also, The Federalist* No. 56 (dividing large states into districts promotes knowledge of local interests); *Oregon v. Mitchell*, 400 U.S. 112, 120 n.2 (1970) ("[The states legislatures] might make an unequal and partial division of the states into districts for the election of representatives. . . . Without these powers in congress, the people can have no remedy; but the 4th section provides a remedy" (quoting Mr. Parsons of the Massachusetts ratifying convention)).

It is true, as argued by plaintiffs, that six or seven of the conventions of the thirteen ratifying states proposed that Congress' power to modify the regulations adopted by the states be limited to situations where the states "shall neglect, or refuse or be unable" to make such regulations. *See* Cong. Globe, 27th Cong., 2d Sess., 465-66 (remarks of Sen. Wright). However, as the Supreme Court

has noted, "Such an amendment was never adopted." *Oregon v. Mitchell*, 400 U.S. at 119 n.2.[2]

After considering the history of Article I, § 4, Justice Black concluded that:

> the Framers of the Constitution and the state legislatures which ratified it intended to grant to Congress the power to lay out or alter the boundaries of the congressional districts. In the ratifying conventions speakers argued . . . that Congress would "most probably lay the state off into districts." And in *Colegrove v. Green*, 328 U.S. 549 (1946), no justice of this Court doubted Congress' power to rearrange the congressional districts according to population; the fight in that case revolved about the judicial power to compel redistricting.

Oregon v. Mitchell, 400 U.S. 112, 121 (1970) (opinion of Black, J.).

C.

Congress did not exercise its power to require that states elect representatives by district until 1842. 5 Stats. 491. Congress' efforts in that regard were summarized by the Supreme Court in *Colegrove v. Green*, 328 U.S. 549 (1946):

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[2] Even among these states, New York observed that "nothing contained in the said Constitution is to be construed to prevent the *Legislature of any State* from passing laws . . . to divide such State into convenient districts, and to apportion its Representatives to and amongst such districts."
Remarks of Sen. Wright, *supra*, at p. 466 (emphasis added).

> Until 1842 there was the greatest diversity among the states in the manner of choosing Representatives because Congress had made no requirement for districting. Congress then provided for the election of Representatives by districts. Strangely enough, the power to do so was seriously questioned; it was still doubted by a Committee of Congress as late as 1901. In 1850 Congress dropped the requirement. The Reapportionment Act of 1862 required that the districts be of contiguous territory. In 1872 Congress added the requirement of substantial equality of inhabitants. This was reinforced in 1911. But the 1929 Act . . . dropped these requirements.

Id. at 555 (citations omitted). In *Wood v. Broom*, 287 U.S. 1 (1932), the Court held that Congress' omission of the compactness, contiguity, and equality of population requirements from the 1929 Act effectively repealed these requirements. *Id.* at 6-7. Congress took no further action to require election by single member districts until it passed the statute presently in force, 2 U.S.C. § 2(c), in 1967. 81 Stat. 581.

D.

This long and continuous interpretation of Congress' powers under Article I, § 4 is persuasive.

In *Smiley v. Holm*, 285 U.S. 355 (1932), the Supreme Court stated:

> The practical construction of Article I, section 4, is impressive. General acquiescence cannot justify departure from the law, but long and

> continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning. This is especially true in the case of constitutional provisions governing the exercise of political right and hence subject to constant and careful scrutiny. Certainly, the terms of the constitutional provision furnish no clear and definite support for a contrary construction as to justify disregard of the established practice in the States.

Id. at 369 (citations omitted).

Congress' exercise of its power to require elections by single-member districts over the past 150 years, coupled with the Supreme Court's tacit approval, in *Ex Parte Siebold,* 100 U.S. 371 (1879); *Ex Parte Yarbrough,* 110 U.S. 651 (1884); *United States v. Gradwell,* 243 U.S. 476 (1917);[3] *Smiley v. Holm; United States v. Classic,* 313 U.S. 299 (1941);[4] *Oregon v. Mitchell,* and *Buckley v. Vallejo,* 424 U.S.

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[3] "Whatever doubt may at one time have existed as to the extent of the power which Congress may exercise under this constitutional sanction in the prescribing of regulations for the conduct of elections for Representatives in Congress or in adopting regulations which States have prescribed for that purpose has been settled by repeated decisions of this court." *Id.* at 482 (citations omitted).

[4] "[T]he states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under [the Necessary and Proper clause]." *Id.* at 315 (citations omitted).

1 (1976),[5] constitute a "long and continuous interpretation" that such action is constitutional.

We also note two recent decisions of the Court which have upheld congressional discretion, *U. S. Department of Commerce v. Montana*, ___ U.S. ___, 112 S.Ct. 1415 (1992), and state discretion, *Burdick v. Takushi*, ___ U.S. ___, 112 S.Ct. 2059 (1992) in voting rights limitations.

E.

Plaintiffs argue that whatever Congress' power under Article I, § 4, it cannot exercise that power in a way that alters the *qualifications* of candidates and voters. They contend that limiting voters to the districts in which they live imposes a "qualification" on them not authorized by the U. S. Constitution. As Alexander Hamilton stated in The Federalist, No. 60:

> [Congress'] authority would be expressly restricted to the regulation of the times, the places, and the manner of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon another occasion, are defined and fixed in the constitution; and are unalterable by the legislature.

(quoted with approval in *Powell v. McCormack*, 395 U.S. 486, 539 (1969) ("immutability of qualifications set forth in [Article I, § 2, cl. 2 of] the Constitution").

---

[5] "The constitutional power of Congress to regulate federal elections is well established. . . . " *Id.* at 13 (citations omitted).

The *Powell* Court approved the decision of Congress in the 1807 election case of William McCreery of Maryland. Maryland had enacted a law requiring one of the two representatives from Baltimore County to be a resident of Baltimore City. Mr. McCreery was duly elected, but his residence was questioned. The House Committee of Elections recommended that he be seated, because it

> considered the qualifications of members to have been unalterably determined by the Federal Convention, unless changed by an authority equal to that which framed the Constitution at first; that neither the State nor the Federal Legislatures are vested with authority to add to those qualifications, so as to change them. . . .

Powell, 395 U.S. at 542-43 (quoting 17 Annals of Cong. 872 (1807)).

The Committee concluded that the local residency requirement was an attempt by the state of Maryland to impose an *additional* qualification on members, and was therefore unconstitutional. 1 A. Hinds, *Precedents of the House of Representatives of the United States* § 414 (1907). However, even those who urged this position were of the opinion that:

> The States might establish districts, but they might not prescribe that Representatives should be confined to the districts.

Id. at p. 383.

Similarly, Article I, § 2, clause 1 of the Constitution prescribes the qualifications for *voters* in congressional contests in the states, which the states may not alter:

> The States in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualifications of voters for those *eo nomine*. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress.

Yarbrough, 110 U.S. at 663. And in *Oregon v. Mitchell*, 400 U.S. 112, (1970), Justice Black opined that:

> Surely no voter *qualification* was more important to the Framers than the *geographical qualification* embodied in the concept of congressional districts. The Framers expected Congress to use this power to eradicate "rotten boroughs," and Congress has in fact used its power to prevent States from electing all Congressmen at large.

Id. at 122 (opinion of Black, J.) (emphasis in original).

Plaintiffs argue the following analogy: just as imposing a residency requirement on candidates violates the candidate qualifications clause, imposing a residency requirement on voters violates the voter qualifications clause. So long as a candidate is a resident of the state, he or she may run for any seat in the state; so long as a voter resides in the state, he or she may vote for any candidate running in any congressional contest in the state. But plaintiffs' analogy is artificial and is not consistent with the language of Article I, Section 2.

The candidate qualifications clause states that "[n]o person shall be a Representative who shall not . . . when elected, be an Inhabitant of that State in which he shall be chosen." U.S. Const. Atr. I, Sec. 1, cl. 2. The clause prescribes a closed-universe of "qualificaitons" for representatives, which may not be added to, subtracted from, or altered. One of the "qualifications" enumerated is residency within the state.

The voter qualifications clause, on the other hand, states that representatives shall be chosen by electors who "shall have the Qualifications requisite for Electors of the most numerous branch of the State Legislature." U.S. Const. Art., I, Sec. 1, cl. 1. In California, that branch is the state Assembly, whose members are elected in single-member districts. Thus, if the geographic location of electors within a state were deemed a "qualification," voters could only vote for representatives by Assembly district, resulting in a congressional delegation either larger or smaller than that prescribed by Congress under Article 1, Sec. 2, cl. 3.

The requirement that voters reside within the congressional district in which they vote is therefore more properly understood as a restriction on the "place" or "manner" of election, which both Congress and the state legislature are empowered to prescribe.

This distinction is also implicitly recognized in California Elections Code § 100(a), challenged by plaintiffs, which provides that:

> Every person who *qualifies* under Section 2 of Article II of the Constitution . . . may vote at any

> election within the territory within which he or she resides.

(Emphasis added.) Article II, Section 2 of the California Constitution provides that "A United States citizen 18 years of age and resident in this state may vote." These are the only "qualifications" imposed on voters.

F.

Congress' authority to require that elections be held by single-member districts can no longer be seriously questioned. The "antiquated states-rights doctrine" relied upon by those who originally opposed Congress' exercise of this power has been discredited, as noted by the majority in *Parsons v. Sanders* [full cite]. And it is settled law that the Framers *intended* to give Congress and the states the power to draw congressional districts as a part of the "manner" of elections.

The states' power to regulate the "time, place and manner" of congressional elections within its borders is coextensive with that of Congress, although Congress' authority is paramount. The power is conferred by the same words, in the same section of the same instrument. Therefore, since 2 U.S.C. § 2(c) is constitutionally valid, so are the California constitutional and statutory provisions challenged by plaintiffs.

VI.

Plaintiffs argue that Article I, § 4 does not answer their claims based on subsequent amendments to the Constitution--the First, Tenth, Fourteenth, Fifteenth,

Nineteenth and Twenty-Sixth amendments, the violation of which is alleged in their fourth and sixth through thirteenth claims. Specifically, plaintiffs argue that district elections discriminate in favor of incumbent candidates in violation of the First Amendment, and that the establishment of special minority districts under the Voting Rights Act violates the prohibition against "separate but equal" in the Fourteenth and Fifteenth amendments, and articulated by the Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954). Plaintiffs argue that these subsequent amendments "trump" whatever power was conferred by Article I, § 4, and that Article I power cannot be exercised inconsistently with those amendments. In view of the authorities cited above in section V above, we need discuss only two specific claims made by plaintiffs.

Plaintiffs' fourth claim is that the residency requirement violates the one-person, one-vote principle of the Voter Qualifications clause and the Equal Protection clause of the Fourteenth Amendment, because of the "physical impossibility of ensuring" that the districts will contain "exactly equal numbers of people." However, the U. S. Supreme Court recently reaffirmed the holding of *Wesberry v. Sanders*, 376 U.S. 1 (1964) that those provisions only require states to "make a good-faith effort to achieve precise mathematical equality." *United States Dept. Commerce v. Montana*, 112 S.Ct. 1415, 1418 (1992) (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969)). Exact equality is not required.

Plaintiffs' ninth claim is that the residency requirements result in winner-take-all contests that "deprive racial minority groups of even the opportunity to obtain

representation in proportion to their voting strength," in violation of the Voting Rights Act, 42 U.S.C. § 1971 *et seq.* The basic objective of the Voting Rights Act is to protect minority voting opportunities, which objective has been pursued in the reapportionment of California's congressional districts. Even if that objective were not, as plaintiffs allege, fully accomplished, a later statute cannot "trump" the original provisions of the Constitution. The Constitution must be superior.

District elections are so fundamental to the political system devised by the Framers in the Constitution that none of the amendments to the Constitution should be construed to alter it by inference.

VII.

Certain additional arguments of the parties need be answered only briefly.

Plaintiffs' seventeenth claim is that the California Supreme Court had no authority to draw congressional districts, and that "[i]f the people and their elected representatives fail to establish congressional districts desired, but not established, by Congress, Congress's remedy under the elections clause lies not in the courts but in itself." However, there is a long history of court participation in redistricting when the elected branches do not do so. *See* authorities cited in *Members of California Congressional Delegation v. Eu*, 790 F.Supp. 925 (N.D. Cal. 1992).

Defendants argue that venue in this district is improper and that plaintiffs are guilty of laches. In view of the conclusions which this court reaches above, no

further consideration of these arguments is necessary. For the same reasons, the motions which have been filed by plaintiffs and by defendant Thomas S. Foley after the submission of this motion to dismiss are denied.

IT IS THEREFORE ORDERED that defendants' motion is granted and the action is dismissed. Because the infirmities of the complaint are matters of law and could not be corrected by amendment, the dismissal is without leave to amend. A judgment of dismissal is hereby entered.

Dated: August 31, 1992.

/s/ Charles A. Legge
CHARLES A. LEGGE
UNITED STATES
DISTRICT JUDGE

/s/ John T. Noonan, Jr.
JOHN T. NOONAN, JR.
CIRCUIT JUDGE

/s/ Eugene F. Lynch
EUGENE F. LYNCH
UNITED STATES
DISTRICT JUDGE

APPENDIX B

DANIEL E. LUNGREN, Attorney General
of the State of California
LINDA A. CABATIC, State Bar No. 87483
Supervising Deputy Attorney General
ALLEN H. SUMNER, State Bar No. 72862
Assistant Attorney General
1515 K Street, Suite 511
P.O. Box 944255
Sacramento, California 94244-2550
Telephone: (916) 324-5468

Attorneys for State Defendants

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TIMOTHY A. DEWITT, et al., Plaintiffs, v. THOMAS S. FOLEY, et al., Defendants.	NO. C-92-0510-CAL THREE JUDGE COURT NOTICE OF MOTION TO DISMISS FOR FAILURE FOR IMPROPER VENUE, LACHES AND FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED (FRCP 12 (B)(3) AND (6) AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF Date: April 24, 1992 Time: 9:30 a.m. Courtroom: 10 (Filed March 16, 1992)

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DANIEL E. LUNGREN, Attorney General
of the State of California
LINDA A. CABATIC, State Bar No. 87483
Supervising Deputy Attorney General
ALLEN H. SUMNER, State Bar No. 72862
Assistant Attorney General
1515 K Street, Suite 511
P.O. Box 944255
Sacramento, California 94244-2550
Telephone: (916) 324-5468

Attorneys for State Defendants

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TIMOTHY A. DEWITT, et al., Plaintiffs, v. THOMAS S. FOLEY, et al, Defendants.	NO. C-92-0510-CAL **THREE JUDGE COURT** **NOTICE OF MOTION TO DISMISS FOR FAILURE FOR IMPROPER VENUE, LACHES AND FAILURE TQ STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED (FRCP 12(B)(3) AND (6) AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF.** **Date: April 24, 1992** **Time: 9:30 a.m.** **Courtroom: 10**

TO TIMOTHY A DEWITT, PAMELA R. DEWITT-CARTER, DOROTHY S. BALDWIN, and RENEE A. RIVAS, Plaintiffs and TIMOTHY A DEWITT and ARLO HALE SMITH, their attorneys of record:

PLEASE TAKE NOTICE that on April 24, 1992, at 9:30 a.m., or as soon thereafter as the matter may be heard in the above-entitled court, located at 450 Golden Gate Avenue, San Francisco, defendants in this action, Pete Wilson, Governor of the State of California, and March Fong Eu, Secretary of State, will move, and hereby move, this court to dismiss this action pursuant to FRCP 12(b)(3) and (6) because plaintiffs' have filed their complaint in an improper venue, the complaint is barred by laches, and the complaint fails to state a claim upon which relief can be granted.

This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities filed concurrently herewith, the pleadings and papers filed herein, and the record in this matter.

DATED: March13, 1992.

DANIEL E. LUNGREN
Attorney General of the State of California

LINDA A. CABATIC
Supervising Deputy Attorney General

Illegible
ALLEN SUMNER
Assistant Attorney General

Attorneys for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF ISSUES

Defendants' motion to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(3) and (6) presents three issues to be decided:

(1) Is Congress' direction in 2 United States Code section 2c that Representatives be elected in single-member districts an appropriate exercise of Congress' authority under article 1, section 4 of the Constitution prescribing the "times, places and manner of holding elections" for its Members?

(2) Have plaintiffs brought this action in the proper venue?

(3) Should plaintiffs' action be dismissed based upon the doctrine of laches?

PRELIMINARY STATEMENT OF THE CASE

Plaintiffs challenge the redistricting for California's 52 congressional Representatives recently ordered by the California Supreme Court. *Wilson v. Eu*, 1 Cal.4th 707 (1992).[1] Specifically, plaintiffs attack the plan's basic premise of allocating the state's Representatives into 52

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[1] The Court accepted and adopted, as modified, redistricting plans proposed by three special Masters appointed four months earlier in light of the failure of the Governor and Legislature to adopt plans for the 1992 Primary and General Elections. *Wilson v. Eu* (1991) 54 Cal.3d 471. We note that this court recently dismissed another challenge to the California Supreme Court's order. *California Democratic Congressional Delegation v. Eu*, ___ F. Supp. ___ [No. C-91-3383 FMS] (N.D. Cal. March 3, 1992).

single-member districts. Instead, plaintiffs assert that California's entire congressional delegation should be elected at-large.

The role in this case of defendants Pet Wilson, Governor of the State of California, and March Fong Eu, Secretary of State is "formalistic," arising solely from their responsibility to apply the districts adopted by the California Supreme Court and conduct elections using those districts. *California Democratic Congressional Delegation v. Eu, supra,* slip, opn. at p. 5; Cal. Const., art. V, § 1; and Cal. Elec. Code § 55.

Plaintiffs present their challenge by way of nine separate claims. However, the gravamen of the claims – individually and collectively – rests upon the question as to whether or not Congress acted within its authority when it enacted 2 United States Code section 2c, requiring election of Representatives by district. Section 2c, enacted in 1967, provides in relevant part:

> "In each state entitled . . . to more than one Representative . . . there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative. . . . "

This provision was adopted by Congress pursuant to article I, section 4, clause 1, of the United States Constitution:

> "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by

> law make or alter such regulations, except as to the places of choosing Senators."

In fashioning its plan, the California Supreme Court was "guided by," inter alia, federal law, article XXI, section 1 of the California Constitution,[2] and the standards established by that Court's previous redistricting decisions. *Wilson v. Eu, supra,* 54 Cal.3d at 473. Those decisions had expressly cited Congress' mandate of single-member districts as binding upon the State of California. *Legislature v. Reinecke,* 6 Cal.3d 595, 603 (1972).[3]

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[2] Article XXI, section 1(a) of the California Constitution reads in relevant part: "Each member of . . . Congress . . . shall be elected from a single-member district."

This provision is implemented by California Elections Code section 25000, which provides in relevant part:

> "At each general election there shall be elected to Congress of the United States: (a) One Representative for each congressional district. . . . "

[3] In creating the congressional districts challenged by plaintiffs, the Masters were primarily guided by the United States Supreme Court's directions in *Karcher v. Daggett,* 462 U.S. 725 (1983). *Wilson v. Eu, supra,* 1 Cal. 4th at 717. *Karcher,* in turn, directs:

> "Article I, § 2, establishes a 'high standard of justice and common sense' for the apportionment of congressional districts: 'equal representation for equal numbers of people.' *Wesberry v. Sanders,* 376 U.S. 1, 18 (1964). Precise mathematical equality, however, may be impossible to achieve in an imperfect world; therefore the 'equal representation' standard is enforced only to the extent of requiring that districts be apportioned to achieve population equality 'as nearly as is practicable.' " (*Id.* at 730; emphasis added.)

Defendants submit that section 2c is a valid exercise of Congress' power to determine the "times, places and manner" of congressional elections, and therefore binding upon them. U.S. Const., art. VI, § 2; Cal. Const., art. III, § 1. Thus since defendants are bound by both federal and state law, plaintiffs' complaint fails to state a claim upon which relief can be granted. Additionally, plaintiffs' action should be dismissed on the grounds of laches. Finally, plaintiffs have selected an improper venue in which to bring their action.

ARGUMENT

I.

PLAINTIFFS HAVE SELECTED THE IMPROPER VENUE

Plaintiffs allege that venue lies in the Northern District of California pursuant to 28 United States Code Section 1391(b)(2) because a substantial part of the acts complained of occurred in this district. However, defendants maintain their offices and perform their duties relating to elections in the City of Sacramento, the capital of the State of California. (Cal. Gov. Code, § 1060.) Any claim based upon defendants' election duties occurred, and must be heard, where those duties are performed. *Shayer v. Kirkpatrick,* 541 F.Supp. 922, 925 (W.D. Mo. 1982). Accordingly, this action should be transferred to the Eastern District of California.

II.

PLAINTIFFS' ACTION SHOULD BE DISMISSED ON THE GROUNDS OF LACHES

This court recently dismissed a challenge to the redistricting plan at issue here on the grounds of abstention. *California Democratic Congressional Delegation v. Eu, supra,* ___ F.Supp. ___ [C-91-3383 FMS]. Specifically, the court ruled that under application of *Younger v. Harris,* 401 U.S. 37 (1971) and *Middlesex County v. Garden State Bar Assoc.,* 457 U.S. 423 (1982), it was required to abstain, as a balance of constitutional federalism, to the previously-filed proceeding before the California Supreme Court, *Wilson v. Eu. supra,* 1 Cal.4th 707. The court noted that the parties in *California Democratic Congressional Delegation* had raised their contentions under the United States Constitution and the Voting Rights Act in the proceedings before both the California Supreme Court and its masters. Slip opn. at –17.

In contrast, plaintiffs here delayed the filing of this action or any other action, until after the California Supreme Court had issued its order adopting the Masters' redistricting plan.[4] Plaintiffs were well aware of the

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[4] Since September of 1991, plaintiffs were on notice that the congressional plan would require single-member districts. The Masters held six days of public hearings in Sacramento, San Francisco, San Diego and Los Angeles. *Wilson v. Eu, supra,* 1 Cal.4th at 713. Oral and written testimony was received on a variety of topics, as well as 22 separate plans proffered by various interests. *Id.* at 742. The Masters stated that "we were uniformly impressed by the sense of responsibility and goodwill exhibited by these witnesses and their belief that the Masters would attempt to address their concerns, fairly and equitably." (*Id.* at 743.)

fact that following the 1990 census, the State was mandated to adjust the boundary lines of its voting districts for representatives to Congress by the federal constitution and state constitution. (*Id.* at p. 2.) Yet, they did nothing to prevent that from occurring, until it was too late.

Additionally, the Masters reviewed transcripts of 12 public hearings held by the California Senate from December 1990 to September 1991 on legislative and congressional redistricting. (*Id.* at 742.) Plaintiffs failed to participate in these hearings either. The summary of these hearings from California Senate Committee on Elections and Reapportionment is attached as Exhibit A. Defendants request that the court take judicial notice of the California Legislature's report pursuant to rule 201 of the Federal Rules of Evidence.

Following presentation of the Masters' Report, the California Supreme Court itself then accepted additional written comments and amici curiae briefs from any interested party on the districts proposed in the report. (*Id.* at 720.) Again, there was no comment from plaintiffs.

Plaintiffs thus had ample notice that California intended to comply with Congress' mandate of single-member districts in developing the State's redistricting plan and failed to do anything to preserve their interests. The California Legislature and the Supreme Court's Masters conducted numerous public hearings around the state from December of 1990 through December of 1991, accepting oral or written testimony from all interested parties. Once the Masters' report was released, the California Supreme Court itself accepted direct comment from any interested party. "We have no doubt that the state proceedings here provided the required due process for the adjudication of the federal issues." *California Democratic Congressional Delegation v. Eu, supra,* slip. opn. at 17.

Yet nowhere in this process of public hearings and comment did plaintiffs every once raise any objection to the developing plan of election by single-member district. Rather, plaintiffs waited until the California Supreme Court had adopted the redistricting plan before filing the present action.

Accordingly, their action praying for equitable relief setting aside the California Supreme Court's order should be dismissed on the grounds of laches.

Laches is an equitable defense, *Citizens, Etc. v. Secretary, U.S. Dept. of Energy,* 683 F.2d 1171, 1174 (8th Cir. 1982), consisting of two elements: (1) inexcusable delay in instituting suit, and (2) prejudice resulting to the defendant from such delay. *Gruca v. United States Steel Corporation,* 495 F.2d 1252, 1258 (3rd Cir. 1974). Relief is addressed to the sound discretion of the trial court. *Ibid.*

Here, on September 6, 1991, defendant Wilson filed a petition with the California Supreme Court, alleging the failure of the State Legislature process to produce a redistricting plan following the 1990 census and requesting the California Supreme Court to assume jurisdiction. (*Id.* at p. 3.) Plaintiffs did nothing to prevent this from occurring. Here, Congress has required election by district since 1967. 81 Stat. 581. Pursuant to Congress' directive, and the implementing provisions of state law, in September of 1991 the California Supreme Court instructed its Masters to prepare recommendations for, inter alia, " . . . 52 single-member congressional district. . . . " *Wilson v. Eu, supra,* 54 Cal.3d at 473. Moreover, as a result of plaintiffs' inexcusable delay, defendants have been prejudiced.

This court has already recognized that "speed was important" in resolving California's redistricting because defendant Secretary of State could not hold the June 1992 elections "unless all judicial decisions on redistricting were completed by the end of January." *California Democratic Congressional Delegation v. Eu, supra,* slip. opn. at p. 7. But here, plaintiffs did not even file their action until

January 29, 1992. Additionally, the California Supreme Court has specifically declared that the relief plaintiffs seek – elections at-large – would tremendously increase the burdens and expenses of effective campaigning" and "seriously impede the casting of uniformed ballots." *Legislature v. Reinecke*, (1972), *supra*, 6 Cal.3d at 603.

Plaintiffs' delay in filing this suit, seeking elections at-large of the 52-member congressional delegation would thus prejudice not only the named defendants who must conduct the election, but also all candidates for Congress and California's entire electorate. Accordingly, the court should exercise its discretion to dismiss plaintiffs' actions based upon laches:

> "In determining whether the doctrine of laches should bar a lawsuit, all the particular circumstances of each case must be considered, including the length of delay, the reasons for it, its effect on the defendant, and the overall fairness of permitting the plaintiff to assert his or her action." *Citizens, Etc. v. Secretary, U.S. Dept. of Energy, supra*, 683 F.2d at 1174.

III.

CONGRESS HAS AUTHORITY TO REQUIRE REPRESENTATIVES BE ELECTED BY DISTRICT

This case turns entirely upon construction of article, I, section 4, clause 1, of the United States Constitution. Specifically, does Congress' authority to prescribe the "times, places and manner" of elections for its Members give it the power to require election by district?

While defendant find no decision specifically addressing this question, the legislative history of article I, section 4, Congress' long exercise of its powers thereunder, and the recognition by the United States Supreme Court of Congress' actions for more than 150 years, all evince the clear intent, understanding and recognition that Congress does in fact have the authority to require Representatives to be elected by district.

A. The Founders Intended For Congress To Ensure That Representatives Be Elected By District

Alexander Hamilton, in *The Federalist*, termed article I, section 4, the most "completely defensible" provision of the entire Constitution: "Its propriety rests upon the evidence of this plain proposition, that **every government ought to contain in itself the means of its own preservation.**" (*The Federalist*, No. 59 (Mentor 1961), at p. 362; emphasis in original). From initial conception through final ratification, those who debated, drafted, supported and opposed the Constitution all recognized that it gave Congress the power to require Representatives to be elected by district.

James Madison's *Notes of Debates in the Federal Convention of 1787* chronicle that once the Great Compromise had been achieved, whereby the Senate would be elected by and represent the States and the House elected by and represent the People, the Federal Convention still had to determine the specifics of how the House should be elected. One view, advanced by George Mason and James Wilson of Virginia, was for direct " . . . election by the people in large districts which would be most likely to

obtain men of intelligence and uprightness; subdividing the **districts** only for the accommodation of voters." (Madison, *Notes of Debates in the Federal Convention of 1787* (Norton 1987), at p. 85; emphasis added.) Others, such as Elbridge Gerry of Massachusetts and Roger Sherman of Connecticut, " . . . opposed elections by the people in **districts**, as not likely to produce such fit men as elections by the State Legislatures." (Notes, *supra*, at p. 86; emphasis added.) Ultimately, it was concluded that the States had been given adequate deference through their selection of Senators; Representatives were to be elected directly by the People.

The Committee of Detail then submitted draft lan guage to the Convention very similar to the final wording of the present article I, section 4:

> "The times and places and manner of holding the elections of the members of each House shall be prescribed by the Legislature of each State; but their provisions concerning them may, at any time be altered by the legislature of the United States." (*Notes, supra* at p. 387.)

This language was amended to limit Congress' power over State legislatures in their selection of Senators. (*Id.* at 423.)

Charles Pickney and John Rutledge of South Carolina then proposed amendments to remove Congress' power over elections altogether. "The States they contended could and must be relied on in such cases." (*Ibid.*)

Madison himself led the fight to maintain Congress' authority:

"The policy of referring the appointment of the House of Representatives to the people and not to the Legislatures of the States, supposes that the result will be somewhat influenced by the mode. This view of the question seems to decide that the Legislature of the States ought not to have the uncontrolled right of regulating the times, places and manner of holding elections. **These were words of great latitude.** It was impossible to foresee all the abuses that might be made of the discretionary power. Whether the electors should vote by ballot or viva voce, should assemble at this place or that place; should be divided into districts or all meet at one place, **should all vote for all the representatives; or all in a district vote for a number allotted to the district;** these and many other points would depend on the Legislatures, and might materially affect the appointments. Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed. . . . What danger could there be in giving a controlling power to the National Legislature? Of whom was it to consist?" (*Ibid*; empahsis added.)

Pickney's amendments failed. The Constitution which the Convention presented to the States for ratification contained article I, section 4, in its present form, giving Congress the "great latitude" fought for by Mason. Congress would have the power to determine, among other things, whether Representatives shall be elected by district.

With completion of the Convention's drafting, attention shifted to the debates. Ironically, much of the opponents' attack against article I, section 4, raised the fear that Congress would abuse its power by requiring the very at-large election of Representatives which plaintiffs pray for:

> "The proposed Congress may make the whole state one district, and direct, that the capital (the city of New York, for instance) shall be the place for holding the election . . . They may declare that those members who have the greatest number of votes, shall be considered as duly elected; the consequence would be that the people, who are dispersed in the interior parts of the state, would give their votes for a variety of candidates, while any order, or profession, residing in the populous places, by uniting their interests, might procure whom they pleased to be chosen – and by this means the representatives of the states may be elected by one-tenth part of the people who actually vote." ("Brutus" Essay IV, to the People of the State of New York, November 29, 1787, *The Anti-Federalist Papers* (Ketcham ed. 1986) at p. 329.

See also "Speech of Patrick Henry to the Virginia Ratifying Convention," June 7, 1788 (*id.* at 215); "Centinel" No. I to the Freemen of Pennsylvania, October 5, 1787 (*Id.* at p. 235); and "Cato" Letter VII to the Citizens of the State of New York, January 3, 1788 (*id.* at p. 323).

The opponents demanded that Congress' power to regulate election of Representatives be totally eliminated, "The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents." December 18, 1787, (*id.* at 240), or at least be limited to

instances " . . . when the legislature of any state shall neglect, refuse, or be disabled, by invasion or rebellion, to prescribe the same." "Additions Proposed By the Virginia Convention: A Proposed Bill of Rights," June 27, 1788 (*id.* at 224).

The Federalists, of course, defended Congress' power. Hamilton maintained that article I, section 4, provided essential "discretion power" over elections allowing Congress to modify procedures as necessary to meet any "change in the situation of the country." *The Federalist*, No. 59, *supra* at p. 363.

Madison in turn described the division of States into congressional districts, the method which he and others assumed would be adopted.[5] "The city of Philadelphia is supposed to contain between fifty and sixty thousand souls. It will therefore form nearly two districts for the choice of federal representatives." *The Federalist* No. 57, *supra* at p. 355; emphasis added. He believed this approach would assure that each Representative was acquainted with the interests of his own constituents, and that the House collectively would have the necessary breadth of knowledge: "Divide the largest State into ten or twelve districts and it will be found that there will be no peculiar local interests in either which would not be within the knowledge of the representative of the district." *The Federalist* No. 56, *supra* at 347; emphasis added.

Congress' power under article I, section 4, was also cited as a check against abuses by State legislatures. As

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[5] *See Wesberry v. Sanders*, 376 U.S. 1, 15 (1963).

Mr. Parsons, delegate to the Massachusetts convention, explained:

> "They might make an unequal and partial division of the states into districts for the election of representatives, or they might even disqualify one third of the electors. Without these powers in Congress, the people can have no remedy; but the 4th section provides a remedy, a controlling power in a legislature, composed of senators and representatives of twelve states, without the influence of our commotions and factions, who will hear impartially, and preserve and restore to the people their equal and sacred rights of election." 2 J.Elliot's *Debates on the Federal Constitution* 27 (1876); *Oregon v. Mitchell*, 400 U.S. 112, 120 (1970).

The Constitution was, of course, eventually ratified with the language of article I, section 4, unchanged.

The evolution of article I, section 4, as well as the supporting and opposing arguments, demonstrate that Congress' authority to prescribe the "times, places and manner" of electing Representatives included, and still includes, the power to require election by district. Indeed, election by district was at the center of all debates: Should election by district be direct or indirect through the State legislatures? Should the power to set districts be given to the States or to Congress? And, would Congress abuse its power by imposing elections at-large instead of by district? One constant throughout the debates was the fact that article I, section 4, gave Congress the power to require election by district.

B. Congress Has Exercised Its Power To Require District Elections For 150 Years Without Challenge

For the first 50 years following ratification of the Constitution Congress took no action, resulting in great diversity among the States in the manner of choosing Representatives. *Colegrove v. Green*, 328 U.S. 549, 555 (1945). Some states elected all of their Representatives on a single state ticket. *United States v. Gradwell*, 243 U.S. 476, 482 (1916). Then in 1842 Congress enacted its first law requiring election of Representatives by single-member districts. Act of June 25, 1844, § 2, 5 Stat. 491; *Whitcomb v. Chavis*, 403 U.S. 124, 158, n. 39 (1970); *Colegrove v. Green*, *supra*, 243 U.S. at 555 (1945); *United States v. Gradwell*, *supra*, 243 U.S. at 482.

Congress acted to eliminate what was then known as the "general ticket system," whereby every elector voted for as many names as the State was entitled to Representatives in Congress. Congress concluded that the general ticket system worked an injustice to other States which did not use it, and within States using the system gave undue power to the majority political party by submerging minority voters.[6] *Whitcomb v. Chavis*, *supra*, 403 U.S. at

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[6] Representative Campbell, sponsor of the act, explained that "(I)n this, the popular branch of the Legislature, the true principle of the Constitution was, that minorities as well as majorities should be represented; but where the general ticket system prevailed, the voice of the minority was suppressed. Mr. Q's motive in contending for this amendment, was a desire to preserve the influence of the small States. Georgia, New Jersey, and Alabama, now elected by general ticket; comparatively small numbers of Representatives, yet, on all party questions,

157, fn. 13; *Ex Parte Yarbrough*, 110 U.S. 651, 660 (1883). Earlier commentators explained that Congress' move to single-member districts:

> "Was recommended by the wisdom and justice of giving, as far as possible, to the local subdivisions of the people of each state, a due influence in the choice of representatives, so as not to leave the aggregate minority of the people in a state, through approaching perhaps to a majority, to be wholly overpowered by the combined action of the numerical majority, without any voice whatever in the national councils." 1 Kent, *Commentaries* (12th ed. 1873) 230-231, n. (c).; *Colegrove v. Green, supra*, 328 U.S. at 553.

Modern observers have simply said that Congress' action in 1842 "signalled its belief that Representatives should

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they had a stronger voice than the largest states, who went on the district plan. While New Jersey, in such a case, made her voice tell as six, the voice of New York, numerous as was her delegation, told but as two. The large States, feeling this, would soon resort to the plan of a general ticket; and then what became of the influence of the small States? They must be lost, and swallowed up. Should New York, for example, resort to that system, though her population might be so equally divided that one party exceeded the other but by a single man, the preponderance of that one man would give to the State forty votes on that floor in favor of his side of the question; a power equal to one sixth of all the rest of the Union. On all the questions peculiar to Southern interests, the Northern States, owing to the district system, were now divided. While the Southern voted in solid phalanx; but let the general ticket prevail, and they would overwhelm the South. He had once doubted the constitutionality of the amendment; but, on fuller examination, his doubts had been removed – the constitutional objection was wholly technical." 11 Cong. Globe 445 (April 26, 1842); 27th Cong. 2d Sess. 1842.

be representative." *Montano v. Lefkowitz*, 575 F.2d 378, 385 (2nd Cir. 1978).

There was no challenge to Congress' decision in 1842 requiring election by single-member districts. However, 35 years later the United States Supreme Court did comment upon Congress' action in a series of cases during the 1870's and 1880's dealing with election reforms enacted following the Civil War.

Culminating in the United States Statutes of 1873-74, "Crimes Against the Elective Franchise and Civil Rights of Citizens," Rev. Stats., §§ 5506 to 5532, Congress enacted a number of election reforms to protect the newly-freed black voters and implement the Fourteenth and Fifteenth Amendments. These provisions addressed abuses such as false registration, bribery, false returns and neglect of election duties by state and local officials. *United States v. Gradwell, supra*, 243 U.S. at 483. The United States Supreme Court sustained enactment of these laws as within Congress' authority to prescribe the "times, places and manner" of elections pursuant to article I, section 4. The Court specifically cited as precedent Congress' action 35 years' earlier requiring single-member districts.

In *Ex Parte Siebold*, 100 U.S. 371 (1879), several election judges who had been convicted of violating the new voting procedures challenged Congress' authority to enact such laws. The Court upheld Congress' action, explaining:

> "Congress has partially regulated the subject heretofore. In 1842, it passed a law for the election of representatives by separate districts;

> and, subsequently, other laws fixing the time of election, and directing that the elections shall be by ballot. **No one will pretend, at least at the present day, that these laws were unconstitutional because they only partially covered the subject.**" (*Id.* at 384; emphasis added.)

The Court characterized Congress' power under article I, section 4, as "plenary" (*Id.* at p. 388), stating: "The power of Congress, as we have seen, is paramount, and may be exercised at any time, and to any extent which it deems expedient. . . . " (*Id.* at p. 392) Following and citing *Ex Parte Siebold,* the Court in *Ex Parte Yarbrough, supra,* 110 U.S. 651, upheld other convictions under the Civil War election reforms. Again, the Court cited article I, section 4, and the action of Congress' in 1842, requiring single-member districts:

> "But when, in the pursuance of a new demand for action, that body, as it did in the cases just enumerated, finds it necessary to make additional laws for the free, the pure, and the safe exercise of this right of voting, they stand upon the same ground and are to be upheld for the same reasons." (*Id.* p. 662)

Thus, by the 1870's the validity of Congress' action in 1842 requiring single-member districts was unquestioned and the Court dismissed the idea anyone would pretend "at the present day" that Congress had exceeded its authority 35 years before.

The requirement of single-member districts continued, with minor interruption, from 1842 until 1929. *Colegrove v. Green, supra,* 328 U.S. at 555. Then, in the Act of June 18, 1929, Congress omitted the requirement that

districts be compact, contiguous and equal in population as to the new districts created under the Fifteenth Census. 46 Stat. 21, ch. 28. Although Congress did not expressly repeal the previous single-member district requirement of the Act of 1911, the Court ruled that this was the intent and result of Congress' action in 1929. *Wood v. Broom*, 287 U.S. 1 (1932).

Elimination of single-member districts of equal population inevitably led to disparity and malapportionment between districts.[7] By 1963, some districts contained two to three times the population of others, forcing the Court to intervene and require equal representation. *Wesberry v. Sanders, supra*, 376 U.S. 1. Although the authority of Congress pursuant to article I, section 4, was not directly at issue in *Wesberry*, it was discussed at length by both the majority and dissent.

The majority cited the Founders' debates as clear intent that Congress was to have the power to assure equal representation:

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[7] Courts addressing redistricting plans during the hiatus in federal legislation requiring single-member districts acknowledged that election by district was "desirable," "historically contemplated by the framers of the Constitution," *Norton v. Campbell*, 359 F.2d 608, 611-612 (10th Cir. 1966), and "the better practice." *Exon v. Tiemann*, 279 F.Supp. 603, 605 (D. Neb. 1967). States, of course, were free to adopt election by district, *Norton* at page 611, but federal courts could not order it:

> "It would be improper for this court to order the Legislature to provide for election by districts in the absence of an Act of Congress so requiring. . . ." *Exon, supra*, at p. 605; emphasis added.

> "Congress' power, said John Steele at the North Carolina convention, was not to be used to allow Congress to create rotten boroughs; in answer to another delegate's suggestion that Congress might use its power to favor people living near the seacoast, Steele said that Congress 'most probably' would **'lay the State off into districts'** and if it made laws 'inconsistent with the Constitution, independent judges will not uphold them, nor will the people obey them' " (*Wesberry, supra,* at 16; emphasis added.)

The majority did not question Congress' authority to require election by districts as one means to guarantee equal representation. Rather, the issue in *Wesberry* was the Court's role given Congress' failure to act.

Justice Hanlan, in his dissent, argued that the authority of Congress under article I, section 4, was the very reason the Court should not act: "There is nothing to indicate any limitation whatsoever on this grant of plenary initial and supervisory power" (*id.* at 30). Justice Hanlan cited the same words by the Founders:

> "The debates in the ratifying conventions, as clearly as Madison's statement at the Philadelphia Convention [cite] indicate that under § 4, the State legislatures, subject only to the ultimate control of Congress, could district as they chose" (*id.* at 34).

Disagreeing as to what role the Court should play, both the majority and dissent recognized that Congress had plenary authority under article I, section 4, to compel election by districts.

Four years after *Wesberry,* Congress re-enacted the requirement of election by single-member districts in

1967 via the present 2 United States Code section 2c. 81 Stat. 581. Courts have characterized Congress' debate in 1967 as "echoing the views of their predecessors of 1842 with respect to the representative nature of representatives," *Montano v. Lefkowitz, supra,* 575 F.2d at 385, and having "made clear their distaste for at-large elections." *Shayer v. Kirkpatrick, supra,* 541 F.Supp. at 927.

Senator Howard Baker, one of the sponsors, explained on the Senate Floor, that single-member districts afford "maximum protection of the rights of all people and maximum responsiveness to their needs," 113 Cong. Rec. 34365-66 (Nov. 30, 1967). He noted, "The concept of single-member districts for a unique and special reason has been a nonpartisan undertaking by Members on both sides of the aisle.[8] *Ibid.*

As with Congress' initial decision in 1842 requiring single-member districts, there was no direct challenge to re-enactment of single-member districts in 1967. However, just as the United States Supreme Court cited Congress' action in 1842 as precedent for the later election reforms of the 1870's. *Ex Parte Siebold, supra,* 110 U.S. 651, so too did the Court cite re-enactment of single-districts in 1967 as precedential authority for the Voting Rights Act Amendments of 1970. Pub. L. 91-285, 84 Stat. 314.

The issue in *Oregon v. Mitchell, supra,* 400 U.S. 112, was Congress' authority, pursuant to article I, section 4,

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[8] "The passages from the floor debate . . . indicate opposition to at-large elections, rather than opposition to at-large elections prompted by *Wesberry.*" *Shayer v. Kirkpatrick,* (1982) *supra,* 541 F.Supp. at 927.

to lower the voting age to 18. In his lead plurality opinion upholding Congress' power, Justice Black explained:

> "The breadth of power-granted to Congress to make or to alter election regulations in national elections . . . is demonstrated by the fact that the Framers of the Constitution and the state legislatures which ratified it **intended to grant to Congress the power to lay out or alter the boundaries of congressional districts** . . . and in *Colegrove v. Green*, 328 U.S. 549 (1946), no Justice of this Court doubted Congress' power to rearrange the congressional districts according to population; the fight in that case revolved about the judicial power to compel redistricting.
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> "Surely no voter qualification was more important to the Framers than the geographical qualification embodied in the concept of congressional districts . . . There can be no doubt that the power to alter congressional district lines is vastly more significant in its effect than the power to permit 18-year-old citizens to go to the polls and vote in all federal actions." (*Id.* at 121-122; emphasis added.)

Oregon was the Court's last occasion to address article I, section 4, and it was consistent with all of the Court's previous comments. For 150 years Congress has exercised its power pursuant to article I, section 4, to require election of Representatives by district. For 100 years the Court has cited Congress' enactment of district voting as precedent for other election laws premised upon article I, section 4.

C. **Elections At-Large Are Disfavored**

Courts have long disfavored at-large elections, citing the same factors which moved Congress to require single-member districts: winner-take-all elections submerge minorities by overrepresenting the winning party, *Whitcomb v. Chavis, supra,* 403 U.S. at 159; a preference for reflecting community interests as closely as possible, *ibid;* long and cumbersome ballots making intelligent choices difficult, *Lucas v. Colorado Gen. Assembly,* 377 U.S. 713, 731 (1963); residents have no representative specifically responsible to them, *ibid;* and block voting by residents in multi-member districts results in undue representation relative to voters in single-member districts. *Chapman v. Meier,* 420 U.S. 1, 16 (1974); *see also Thornburg v. Gingles,* 478 U.S. 30, fn. 13 (1985). These problems would increase in a state the size of California:

> "[to] conduct statewide elections to fill . . . congressional seats in a state of California's geographical size and large population would not only tremendously increase the burdens and expenses of effective campaigning but, by increasing the choices confronting the electors . . . would seriously impede the casting of informed ballots." *Legislature v. Reinecke, supra,* 6 Cal.3d at 603; *Assembly v. Deukmejian,* 30 Cal.3d 638, 664 (1982).

This long-standing preference for single-member elections has now been incorporated into the Court's constitutional guidelines for apportioning congressional seats:

> " . . . the command of Art. I, § 2, that States create congressional districts which provide

> equal representation for equal numbers of people permits only limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *Kirkpatrick v. Preisler* (1968), *supra*, 394 U.S. at 531 (emphasis added); *Wells v. Rockefeller* (1968) 394 U.S. 542, 546; and *White v. Weiser* (1973), *supra* 412 U.S. at 790.

And Congress may, pursuant to its authority under to article I, section 5, for judging qualifications of its own members, reject a delegation of Representatives-at-large. *Colegrove v. Green* (1945), *supra* 328 U.S. at 553.

Finally, for the same reasons that congressional elections must be by single-member districts, primary elections to select the nominees must also be by single-member district:

> "If could not be seriously contended that a primary to chose nominees for the various congressional districts in a general election could validly be held on a statewide basis or, when a country contains several congressional districts, even on a countywide basis, with the victors assigned to the districts in some arbitrary fashion which might result . . . in the nominee's being unresponsive to the desires of the voters in the district." (*Montano v. Lefkowitz* (1978), *supra*, 575 F.2d at 385.)

As to election of state legislatures, the Court has expressed the same disfavor for at-large elections. At-large elections are not unconstitutional per se under the Fourteenth and Fifteenth Amendments. *Thornburg v. Gingles, supra*, 478 U.S. at 48. However, single-member districts are "preferable," *Connor v. Williams*, 402 U.S. 690,

692 (1970), and federal courts required to fashion state reapportionment plans are directed to use single-member districts "absent insurmountable difficulties." *Chapman v. Meier, supra.* 420 U.S. at 18.

D. The Court Should Honor Congress' Determinations Pursuant To Article I. section 4

Again, Alexander Hamilton characterized Congress' authority under article I, section 4, as one of the most fundamental provisions of the entire Constitution – the means of Congress' own preservation. State courts are bound by Congress' determinations under this provision. *Assembly v. Deukmejian, supra* 30 Cal.3d at 662; *Simpson v. Mahan,* 185 S.E.2d 47, 212 Va. 416 (1972). So too have federal courts honored the historic exercise by Congress of a power essential to the very existence of that co-equal branch. Some 60 years ago the Court admonished:

> "The practical construction of Article I, section 4, is impressive. General Acquiescence cannot justify departure from the law, **but long and continuous interpretation** in the course of official action under the law may aid in removing doubts as to its meaning. **This is especially true in the case of constitutional provisions governing the exercise of political rights and hence subject to constant and careful scrutiny."** *Smiley v. Holm,* 285 U.S. 355, 369, (1931).

Has there been "long and continuous" interpretation of Congress' authority to require election by single-member districts? Clearly – 150 years' worth.

Congress ordered election by district in 1842, and by 1879 Congress' action was so accepted that the Court

would comment "No one will pretend, at least at the present day, that these laws were unconstitutional. . . ." *Ex Parte Siebold* (1879), *supra*, 100 U.S. at 384. The "present day" which the court spoke of was under President Rutherford B. Hayes and Chief Justice Morrison R. Waite.

Thirty-eight years later, the Court remarked that "any doubt" as to Congress' power under article I, section 4, "has been settled by repeated decisions of this court," *United States v. Gradwell, supra*, 243 at 482, citing *Ex Parte Siebold* and its progeny. The same result was reached again in 1931, *Smiley v. Holm, supra*, 285 U.S. at 366-67; and in 1940, *United States v. Classic*, 313 U.S. 299, 315 (1940); and in 1970: " . . . a long line of decisions in this Court [have held] that Congress has ultimate supervisory power over congressional elections." *Oregon v. Mitchell, supra*, 400 U.S. at 122; And again in 1975: "The constitutional power of Congress to regulate federal elections is well established. . . ." *Buckley v. Valeo*, 424 U.S. 1, 13 (1975).

Analysis of almost two hundred years' worth of debates from the Founders, the drafting evolution of article I, section 4, arguments in support and opposition to its ratification, its application by Congress, and the Court's review of Congress' actions all returns to Hamilton's simple, basic premise:

> "A newly created national government could hardly have been expected to survive without the ultimate power to rule itself and to fill its offices under its own laws." (*Oregon v. Mitchell, supra*, 400 U.S. at 112.

Article I, section 4, gives Congress plenary authority over the procedures to be followed in its Members, including the power to require that elections be by single-member districts.

IV.

PLAINTIFFS ARE NOT ENTITLED TO THREE JUDGE COURT

Plaintiffs in this case claim they are entitled to a three-judge court, pursuant to 28 United States Code section 2284(a). Plaintiffs are mistaken. 28 United States Code section 2284(a), provides:

> "A district court of three judges shall be convened when otherwise required by act of Congress, or when an action is filed challenging the constitutionality of the *apportionment* of *congressional districts* or the apportionment of any statewide legislative body."

As this court has already recognized, the term "reapportionment" describes the process of allocating representatives among *pre-established* districts. *California Democratic Congressional Delegation v. Eu, supra,* slip. opin., p. 1, fn. 1: The term "redistricting" refers to the process of formalizing the boundaries of the districts. *Id.*

Here, plaintiffs are not challenging the allocation of representatives among-pre-established districts, but rather, the constitutionality of pre-established districts, which has been discussed in Argument III.

Consequently, plaintiffs are not entitled to a three-judge court.

CONCLUSION

Congress' direction in 2 United States Code section 2c that Representatives be elected in single-member districts is an appropriate exercise of Congress' authority under article I, section 4, clause 1, of the Constitution prescribing the "times, places and manner of holding elections" for its own Members. Congress has exercised this authority for 150 years and the Supreme Court has recognized the validity of Congress' action for over 100 years. As the supreme law of the land, Congress' determination is binding upon defendants Governor and Secretary of State of California. U.S. Const., art. VI, § 2.

Plaintiffs pray for injunctive orders from this court barring defendants from implementing Congress' direction in the election of California's congressional delegation. However, plaintiffs' request for equitable relief is made with unclean hands. Plaintiffs sat moot through more than a year of public hearings and debate conducted by both the California Legislature and Supreme Court, soliciting comment from all interested parties in fashioning the State's redistricting plan. Plaintiffs were on notice from the inception that the California Supreme Court would follow Congress' requirement of single-member districts. Plaintiffs nevertheless waited to raise their objection until after the California Supreme Court had adopted the redistricting plan and the practical deadline had passed for defendant Secretary of State to implement the June 1992 elections. Plaintiffs can hardly argue that they were taken by surprise that district elections would be used, and their unreasonable and unjustifiable delay in bringing this action would work a severe harm to California's entire electorate.

Plaintiffs have selected the wrong venue for bringing this action. Defendants' official acts in carrying out their election duties are performed in Sacramento, in the Eastern District. Finally, plaintiffs are not entitled to a three-judge court.

For these reasons defendants respectfully request that their motion be granted under Federal Rules of Civil Procedure 12(b) and (6) and that this complaint be dismissed.

DATED: _____

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of the State of California

LINDA A. CABATIC
Supervising Deputy Attorney General

ALLEN SUMNER
Assistant Attorney General

Attorneys for Defendants